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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ELLIOTT LEWIS, an individual, on behalf of himself, and all others similarly situated,

Plaintiff,

v.

WENDY'S INTERNATIONAL, INC., a Corporation; and DOES 1-20, inclusive,

Defendant.

Case No. 09-CV-7193 MMM (JCx)

Assigned for all purposes to Honorable Margaret M. Morrow

NOTICE OF MOTION, MOTION AND MEMORANDUM IN SUPPORT OF DEFENDANT WENDY'S INTERNATIONAL, INC.'S MOTION TO DISMISS/STRIKE SECOND AMENDED COMPLAINT WHICH FAILS TO HEED THE COURT'S SCHEDULING ORDER AND FEDERAL RULES OF CIVIL PROCEDURE 15 AND 16

[Fed.R.Civ.P., Rules 12(b)(6), 12(f), 15(a), 16(b)(4)]

Date: June 28, 2010
Time: 10:00 a.m.
Place: Roybal - Courtroom 780

TO PLAINTIFF AND HIS COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on June 28, 2010, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 780 of the United States District Court, Central District of California, Western Division, located at 255 East Temple Street, Los Angeles, California 90012, before the Honorable Margaret M. Morrow, Defendant Wendy's International, Inc., will and hereby does move the Court pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), Rule 15(a) and Rule 16(b)(4), for an order dismissing Count 6 of the Plaintiff's Second Amended Complaint, with prejudice. Count 6, brought pursuant to the California Private Attorneys General Act, California Labor Code § 2699, *et seq*., is a broad new claim for which Plaintiff has not sought or obtained leave to amend. Further, Plaintiff's January 19, 2010 deadline for filing a motion to add new claims has long since expired, and no relief from it has been sought (let alone good cause shown).

In addition, Plaintiff has not and cannot allege exhaustion of administrative remedies in connection with this claim. For this alternative reason as well, Count 6 should be dismissed with prejudice.

Defendant also moves to strike Plaintiff's class definitions and allegations, Paragraphs 35 through 45, pursuant to Federal Rules of Civil Procedure, Rules 12(f) and 16(b)(4), because Plaintiff failed to file a certification motion by the April 12, 2010 deadline. No leave for relief from this deadline has been sought (let alone good cause shown). For the same reasons, Defendant moves to strike all references in the Second Amended Complaint to "class action" on the cover of the pleading and in Paragraph 1, to "Class Members" in Paragraphs 16, 17 and Prayers A and B, to "class" in Paragraphs 21, 24, 27, 28, 29, 31, 33, 47, 48, 49, 51, 52, 53, 56 and 57, to "member[s] of the class" in Paragraphs 28, 34, 55, to "others" in Paragraphs 57, 60, 61 and 62, to "others similarly situated" on the cover, page 1 and page 22 of the pleading and in Paragraphs 57 and 70, to "all persons similarly situated, and all interested persons" in Paragraph 67, to "those similarly situated" in Paragraph 72,

and to "on behalf of all others similarly situated" in Paragraph 64.

Defendant also moves to strike Plaintiff's "representative" allegations, Paragraphs 36, 72 and 77, pursuant to the *Erie* doctrine because they are procedural allegations and are in direct conflict with Rule 23 of the Federal Rules of Civil Procedure.

This Motion is made following the conference of counsel which took place on April 23, 2010 pursuant to Central District Local Rule 7-3. That meet and confer was preceded by a very detailed letter setting forth the basis for this motion.

This Motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities In Support of the Motion, the concurrently filed Declaration of Mark D. Kemple, and such further evidence, authorities, and argument as may be presented in advance of, or during, the hearing on this Motion.

Dated: May 3, 2010

JONES DAY

By: /s/ Mark D. Kemple
Mark D. Kemple

Attorneys for Defendant
WENDY'S INTERNATIONAL, INC.

TABLE OF CONTENTS

Cases

Statutes

MEMORANDUM OF POINTS AND AUTHORITIES

I. PLAINTIFF'S (A) CLASS ALLEGATIONS AND (B) NEW PAGA CLAIM ARE IN DIRECT VIOLATION OF THIS COURT'S ORDERS AND THE FEDERAL RULES OF CIVIL PROCEDURE, AND SHOULD BE DISMISSED AND/OR STRICKEN.

A. The Court's Scheduling Order.

Pursuant to this Court's Order dated November 5, 2009 (Docket # 13), this Court held a Scheduling Conference on December 21, 2009. At the end of that Conference, it made its Rule 16 Scheduling Order. The Court ordered that April 12, 2010, was the deadline to file any motion for class certification:

> [T]he schedule for filing a class certification motion will be as follows. And I will not extend these dates. So be advised and do what you need to do within this schedule. [¶] The class certification motion must be filed by April 12.

Ex. 1, Reporter's Transcript of Proceedings, December 21, 2009 Scheduling Conference ("Scheduling Order"), attached to Decl. of Mark D. Kemple ("Kemple Decl.") at 14:23-15:3 (emphasis added).[1] In addition, the Court ordered that:

> The deadline for filing of motions or stipulations seeking to amend pleadings to add new parties, new claims, or new defenses will be January 19.
>
> Any amendments that are required by the Court's ruling on the motion to dismiss will be governed by a separate date, and that will be the date in the order. This is for any general additional amendments that either party wishes to make.

Ex. 1 at 14:8-22 (emphasis added).

A few days later, the Court granted Defendant's 12(b)(6) motion, with explicit

[1] Wendy's requests that the Court take judicial notice of this official transcript of proceedings in this action, and of all documents that are referenced as docket entries herein.

instructions to Plaintiff concerning how to plead his claims. (Docket # 20.)

B. Mindful Of the Scheduling Order, In January 2010 Plaintiff Consciously Elects Not To Seek To Add The Same PAGA Claim It Now Purports To Add Unilaterally.

As Plaintiff considered the content his First Amended Complaint ("FAC") in January 2010, Plaintiff toyed with the idea of trying to add the broad PAGA claim – the same claim he now seeks to add months later. In January 2010, the parties had a detailed meet and confer concerning that claim. As defense counsel noted then, Plaintiff's bid to add this new PAGA claim without leave of Court violated not only Rule 15, but the Court's Rule 16 Scheduling Order issued weeks earlier:

> As you know, Plaintiff is beyond his ability to amend of right. Indeed, after the Court set the FRCP Rule 16 deadlines on December 21, an amendment is permitted only for "good cause."[2] Further still, the Court ordered on December 21, 2009, that if any party wished to amend beyond any leave granted by her Order on Defendant's Motion to Dismiss, that party must file a motion to amend to add such claims by no later than January 19, 2010. In short, you may amend your pleading beyond the confines of the leave previously requested and received, only after meeting and conferring, a motion and an order.

Kemple Decl., Ex. 2 (Jan. 7, 2010 Letter from M. Kemple to M. Jacob).

[2] Once a scheduling order issues, no later amendment of the pleadings is permitted unless the Court first modifies the scheduling order on a showing of "good cause" to allow Plaintiff to file a motion to amend. Fed. R. Civ. P. 16(b). *See e.g., Bato v. Lab. Corp. of America Holdings*, No. 09-cv-04671, Docket No. 44, Order at 11 (Morrow, J.) (C.D. Cal. Feb. 8, 2010) *citing* Fed. R. Civ. Proc. 16(b); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir. 2000); *Johnson v. Mammoth Recreations, Inc.* 975 F.2d 604, 609 (9th Cir. 1992). No such motion has been made by Plaintiff.

In response, Plaintiff made no claim then (as he does now[3]) that the Court had not set forth its Rule 16 Scheduling Order on December 21, 2009, including a January 19 deadline for motions for leave to amend to add new claims. Quite the contrary. Throughout January 2010, the parties:

- openly discussed the requirements of the Court's Rule 16 Scheduling Order;
- exchanged their Rule 26 disclosures by January 11, 2010, exactly as ordered by the Court in its Rule 16 Scheduling Order; and
- filed their Local Rule 16-15 Settlement Procedure Selection on January 25, 2010, exactly as ordered by the Court in its Rule 16 Scheduling Order (Docket # 24).

The parties even confirmed that the reason they were doing these things, on these dates, was because the Court's December 21 Scheduling Order required them to do so. *E.g.*:

> Counsel for Defendant: "Michael, As you'll recall, the Court ordered the initial exchange of information to occur on January 11, 2010. I propose that we comply by exchanging them when we meet this coming Monday. Concur?"
>
> Counsel for Plaintiff: "Agreed."

Kemple Decl., Ex. 4 (Jan. 7, 2010 Email from M. Kemple to M. Jacob).

Rather than argue that no Scheduling Order was issued by the Court, Plaintiff argued that California Labor Code § 2699.3 (a)(2)(C) trumped the Court's Scheduling Order and trumped FRCP Rule 15. Specifically, Plaintiff argued that:

> PAGA [California Labor Code § 2699.3 (a)(2)(C)] permits amendment as a matter of right. Accordingly, at the present

[3] Now, however, during the meet and confer that immediately preceded this Motion, Plaintiffs claimed for the first time that no Scheduling Order was made by the Court on December 21, and that the Court's statements in this regard were merely advisory.

> time, we do not believe that Plaintiff's ability to amend is limited as you contend in your letter.

Kemple Decl., Ex. 3 (Jan. 6, 2010 Letter from M. Jacob to M. Kemple). Defense counsel responded that:

> Your assertion that a state statute [California Labor Code § 2699.3 (a)(2)(C)] (regarding amendment of a state pleading) trumps all the foregoing procedures of the Federal Court, including FRCP Rule 15, the Court's Meet and Confer requirements, and the Court's Scheduling Order, runs directly afoul of the *Erie* Doctrine (and common sense). Federal Court procedure applies here. Accordingly, if you would like to allege new claims other than a Section 558 PAGA claim, you are required to comply with the Court's procedures, orders and deadlines. You have not done so.

Kemple Decl., Ex. 2. This Court has since confirmed that reasoning. As it held in *Bato v. Lab. Corp. of America Holdings*, No. 09-cv-04671, Docket No. 44, Order at 10-11 (Morrow, J.) (C.D. Cal. Feb. 8, 2010):

> [Labor Code] § 2699.3 (a)(2)(C) … is a "procedural provision … that directly conflicts with the Federal Rules of Civil Procedure governing amendment," and that, under the Supremacy Clause, U.S. Const. art. VI, cl. 2, and *Hanna v. Plumer*, 380 U.S. 460 (1965), the Federal Rules that govern amendment of pleadings in federal court apply, not the state provision.

Id. citing De Simas v. Big Lots Stores, Inc., No. C 06-6614 SI, 2007 WL 686638, *4 (N.D. Cal. Mar. 2, 2007).

Accordingly, Plaintiff abandoned its bid to move for leave to amend to add that claim, and allowed the deadline for such amendments to lapse. It filed it First

Amended Complaint ("FAC") without a PAGA claim. (Docket # 23.)

C. Having Passed On The PAGA Claim, Plaintiff Re-Files the Same Deficient Complaint (the FAC), Which Is Again Dismissed.

Like his original pleading, Plaintiff's FAC was deficient. In fact, it totally failed to heed this Court's *explicit instructions* set forth in its earlier 12(b)(6) ruling as to how to plead his claim.

On top of this, Plaintiff then rebuffed Defendant's meet and confer efforts to cajole Plaintiff into properly stating his claims. Rather, and despite the fact that its deadlines were approaching, Plaintiff inexplicably opposed Defendant's second motion to dismiss made on the same grounds as its earlier motion to dismiss. (Docket # 26.) Throughout this time period, Plaintiff declined to amend his pleading to bring it in conformity with the Court's plain instruction, stood firm, and awaited a decision from the Court on its still vacuous allegations.

That decision came, again finding Plaintiff's allegations to be wholly deficient. (Docket # 30.) In connection therewith, the Court granted Plaintiff until April 13, 2010, to amend to attempt to restate these claims. *Id*.

D. After the Second Dismissal, Plaintiff Files Its Second Amended Complaint, Late.

And Plaintiff delayed still further:

- The April 12, 2010 class certification deadline came and went. No new pleading was filed prior thereto, and no motion for class certification was filed.
- The April 13, 2010 deadline to attempt to re-allege the prior complaint came and went, without proper filing and service of an amended pleading.[4]

Finally, on April 14, 2010, Plaintiff filed a Second Amended Complaint ("SAC").

[4] This was the second time that Plaintiff failed to comply with General Order 08-02, and had his pleading stricken. (*See* Docket ## 22 and 32.)

E. The PAGA Claim Unilaterally Added To The SAC By Plaintiff In April 2010 Violates The Court's Scheduling Order And Rule 15.

Apart from being a day late (again), Plaintiff's SAC purported to add, unilaterally, the same broad new PAGA claim discussed way back in January, and which Plaintiff elected then (when its deadlines had not yet run) not to seek to add. Plaintiff purported to do so unilaterally (1) without a motion to change the Scheduling Order (on a required showing of good cause[5]), and (2) without, thereafter, a motion for leave to amend under Rule 15 if the Scheduling Order were changed. Plaintiff again simply added this claim with a citation to California Labor Code § 2699.3 (a)(2)(C) which, he claims, gives him leave to amend "of right" in Federal Court. *See* SAC at 20 n.1.

As discussed above – and as Plaintiff knows – this is wholly in correct. State procedural rules do not trump the Federal Rules of Civil Procedure in an action removed to state court. *Hanna v. Plumer*, 380 U.S. 460, 463-74 (1965); *Bato, supra*, Order at 10-11; *see also Erie Railroad Co. v. Tompkin,* 304 U.S. 64 (1938). Even assuming PAGA's procedural requirements applied in federal court (they do not), Plaintiff's PAGA amendment still would untimely.[6] Accordingly, the PAGA claim

[5] Fed. R. Civ. P. 16(b)(4); *Johnson*, 975 F.2d at 609. To establish "good cause" to modify a Scheduling Order, a plaintiff must show that he was (1) diligent in assisting the Court to establish a workable scheduling order, (2) acted diligently to meet whatever schedule was imposed, and (3) made a prompt request for modification once it became apparent that compliance was not possible. *Id.*; *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 607-608 (E.D. Cal. 1999); *Coleman*, 232 F.3d at 1294. The focus of "Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Johnson*, 975 F.2d at 609. "If the party seeking the modification 'was not diligent, the inquiry should end' and the motion to modify should not be granted." *Matrix Motor Co. v. Toyota Jidosha Kabushiki Haisha*, 218 F.R.D. 667, 671 (C.D. Cal. 2003). *See also Johnson*, 975 F.2d at 609 ("carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief"); *Zivkovic v. S. Cal. Edison Co.*, 302 F.3d 1080, 1087-88 (9th Cir. 2002) (diligence was not demonstrated where the moving party did not seek to modify the scheduling order until four months after the scheduling order was issued). Again, no such motion has been made by Plaintiff. Nor could Plaintiff possibly bear this burden in any event.

[6] The PAGA statute provides: "[A] plaintiff may as a matter of right amend an existing complaint to add a cause of action arising under this part at any time within 60 days of the time periods specified in this part." Labor Code § 2699(a)(2)(C). Plaintiff's PAGA letter is dated December 24, 2009. Kemple Decl., Ex. 5 (PAGA

should be dismissed or stricken in its entirety. It violates the Court's Scheduling Order, as well as Federal Rule of Civil Procedure 15.

F. The Class Allegations Of The SAC Also Defy This Court's Scheduling Order.

In addition, the April 14 SAC contains class allegations despite the fact that the time to move to certify any class in this action expired on April 12, 2010. No such motion was made. As such, the SAC is in plain violation of this Court's Orders and the Federal Rules of Civil Procedure. Accordingly, the class allegations should be stricken in their entirety. They violate the Court's Scheduling Order, for which no modification had been requested, let alone based on a showing of good cause.

II. PLAINTIFF DOES NOT, AND CAN NOT, ALLEGE PAGA EXHAUSTION.

Plaintiff's unauthorized PAGA claim also wholly fails to plead that proper notice was given to the Labor Commissioner as is required when bringing any PAGA claim. Nor could it. The December 24 PAGA letter on which Plaintiff attempts to rely asserts, in pertinent total, that "Defendant impeded, discouraged and prevented Plaintiff and other California non-exempt employees from taking meal and rest breaks in accordance with the law," and that "Defendant's policies and company wide practices also prevented Plaintiff . . . from taking meal and rest breaks." Kemple Decl., Ex. 5 (PAGA Letter). This, of course, is significantly less than was alleged in Plaintiff's defective pleadings in this action, which this Court concluded did "not give defendant adequate notice regarding the nature of the claims to which it must respond or sufficiently state the facts on which the claims are based." *See* Order Granting Defendant's Motion to Dismiss ("Order") (Docket # 20)

(continued…)

Letter). Plaintiff's right to sue matured on January 26, 2010 (Labor Code § 2699(a)(2)(A)), and the 60 day period set forth in the statute expired on March 27, 2010. Labor Code § 2699(a)(2)(C). Because the SAC was not filed until April 14, 2010, Plaintiff's amendment would be untimely even if California procedure applied.

at 10.

Any pleading "seeking civil penalties recoverable by the State … for violations of any Labor Code provision specified in Section 2699.5 must now plead compliance with section 2699.3, subdivision (a)'s administrative procedures." *Caliber Bodyworks, Inc. v. Super. Ct.*, 134 Cal. App. 4th 365, 382-83 (2005) *citing* Cal. Lab. Code § 2699.3 ("civil action by an aggrieved employee pursuant to … Section 2699 alleging a violation of any provisions listed in 2699.5 *shall* commence *only* after the following requirements have been met").

The purpose of PAGA's notice requirement is to allow the LWDA to act first on claims it deems worthy of pursuing. The Legislature enacted these exhaustion requirements to "improve[] PAGA by allowing the [LWDA] to act first on more 'serious' violations." *Caliber*, 134 Cal. App. 4th at 375. The Legislature further declared that it was "in the public interest" to ensure that "state labor law enforcement agencies' enforcement actions have primacy over any private enforcement actions pursuant to this Act." *Id.* at n. 6. PAGA bears out these purposes by, among other things, requiring private individuals to provide notice to the LWDA before bringing suit, giving the LWDA the initial right to prosecute, and cutting off a private cause of action in cases where the LWDA cites an employer for violations. Labor Code § 2699(a), (f)-(h); *Caliber*, 134 Cal. App. 4th at 374-77.

Accordingly, all courts to have addressed this issue have held that a litigant who fails to plead satisfaction of these two exhaustion requirements fails to state a PAGA claim for relief. *Caliber*, 134 Cal. App. 4th at 381-384; *Thomas v. Home Depot USA Inc*, 527 F. Supp. 2d 1003, 1007 (N.D. Cal 2007) (after exhausting the requirements of Labor Code § 2699.3(a), a party bringing a PAGA action must plead compliance with the pre-filing notice and exhaustion requirements); *Waisbein v. UBS Fin. Servs.*, 2008 WL 753896, *1 (N.D. Cal. Mar. 19, 2008) (same).

To meet this exhaustion requirement, a Plaintiff must plead and show that:

- he has exhausted administrative requirements by providing notice to the

LWDA of "specific provisions of the code alleged to have been violated, **including the facts and theories to support the alleged violation**" pursuant to Labor Code § 2699.3(a)(1) (emphasis added); and

- he has allowed the agency an opportunity to investigate pursuant to Labor Code § 2699.3(a)(2).

Bato, *supra*, Order at 10 *quoting* Cal. Labor Code § 2699.3. "[A]fter exhausting administrative remedies, [the employee] bringing a civil action must plead compliance with the pre-filing notice and exhaustion requirements." *Id. quoting Thomas*, 527 F. Supp. 2d at 1007.

As this Court has previously observed, "to allow plaintiffs to circumvent compliance with § 2699.3 would 'vitiate the Legislature's express intent that the LWDA have the initial right to investigate and cite an employer for Labor Code violations.'" *Bato*, *supra*, Order at 10 *quoting Caliber*, 134 Cal. App. 4th at 384; *see also Arias v. Super. Ct.*, 46 Cal. 4th 969, 981 (2009) ("[PAGA] requires the employee to give written notice of the alleged Labor Code violation to both the employer and the [LWDA] and the notice must describe the facts and theories supporting the violation.")

Plaintiff fails to adequately plead compliance with PAGA's pre-filing notice and exhaustion requirements. Although the SAC alleges that Plaintiff filed a PAGA notice, and that the LWDA has decided not to investigate the allegations asserted in the notice, the SAC does not allege the content of Plaintiff's PAGA "notice." SAC ¶ 74. Nor does the SAC attach a copy of Plaintiff's PAGA letter for the Court's review.[7]

Even if Plaintiff's December 24 PAGA letter were attached to Plaintiff's SAC, it is non-compliant with the statute because it fails to provide adequate notice to the

[7] *See* Kemple Decl., Ex. 5, (PAGA Letter); Ex. 2 (Jan. 7, 2010 Letter from M. Kemple to M. Jacob identifying deficiencies in Plaintiff's PAGA letter).

LWDA, of the "facts and theories to support the alleged violation[s]." Labor Code § 2699.3(a)(1). Indeed, Plaintiff's PAGA allegations are even less specific than the allegations contained in Plaintiff's original Complaint, which this Court concluded did "not give defendant adequate notice regarding the nature of the claims to which it must respond or sufficiently state the facts on which the claims are based." Order (Docket # 20) at 10.

For example, the PAGA letter merely asserts that "Defendant impeded, discouraged and prevented Plaintiff and other California non-exempt employees from taking meal and rest breaks in accordance with the law" and that "Defendant's policies and company wide practices also prevented Plaintiff . . . from taking meal and rest breaks." Kemple Decl., Ex. 5. This is far less than the allegations this Court already found not provide notice of the claims to the party defendant – let alone to the uninvolved the Labor Commissioner. Compare Order (Docket # 20) at 10 (pleadings in this action did "not give defendant adequate notice regarding the nature of the claims to which it must respond or sufficiently state the facts on which the claims are based").

For this reason as well, Plaintiff's PAGA claim should be dismissed with prejudice. Not only does the SAC's inclusion of this new claim violate Rule 16 and this Court's Scheduling Order, the SAC has not pled – and cannot plead – PAGA exhaustion.

III. PLAINTIFF'S PAGA NON-CLASS REPRESENTATIVE ALLEGATIONS SHOULD BE STRICKEN.

Apart from all the foregoing, Plaintiff's new allegations concerning a "representative" action under PAGA (SAC ¶¶ 36, 72, 77) should be stricken from the SAC as a matter of federal procedure. Plaintiff's obvious and belated attempt to end-run this Court's class certification deadline fails as it seeks to rely on a state procedural rule with no application in federal court. Such reliance fails for precisely the same reasons that Plaintiff's reliance on Labor Code § 2699.3(a)(2)(C) fails.

Pursuant to *Erie Railroad Co. v. Tompkin*, 304 U.S. 64, 78 (1938), *Hanna v. Plumer*, 380 U.S. 460 (1965) and their progeny (the "*Erie* Doctrine"), the elective non-class procedural rule set forth in PAGA (a plaintiff is free to pursue such claims in state court either as a class action or a non-class representative action[8]), is inapplicable in federal court. A plaintiff seeking PAGA remedies for supposed violations suffered by others must obtain class certification under Rule 23, and thereby bring such persons before the Court. And the time for class certification (even on claims properly before the Court) has passed.

It is well-established that federal courts sitting in diversity must apply the state substantive law and federal procedural law. *See Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 426-27 (1996); *Snead v. Metropolitan Property & Casualty Ins. Co.*, 237 F.3d 1080, 1090-91 (9th Cir. 2001); *Clark v. Allstate Ins. Co.*, 106 F. Supp. 2d 1016, 1018 (N.D. Cal. 2009).

Although the classification of a dispute as "substantive" or "procedural" for purposes of *Erie* analysis is sometimes a trying endeavor, the present situation is simply not such a challenge. As the Supreme Court recognized in *Hanna*:

> When a situation is covered by one of the Federal Rules, the question facing the court *is a far cry from the relatively unguided Erie Choice: the court has been instructed to apply the Federal Rule*, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor Constitutional restrictions.

Hanna, 380 U.S. at 471 (emphasis added); *see also Metabolife International Inc. v. Wornick*, 264 F.3d 832, 845 (9th Cir. 2001) (procedural state laws are not used in federal court if to do so would result in a "direct collision" with a Federal Rule of

[8] *See Arias*, 46 Cal. 4th at 981-988 and n.5.

Civil Procedure); *accord Clark*, 106 F. Supp. 2d at 1018. As the Supreme Court reasoned:

> to hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act.

Hanna, 380 U.S. at 473-74.

Here, there is a direct conflict between a non-class "representative" PAGA claim and Rule 23. As a matter of state procedure, a Plaintiff *may* pursue a PAGA claim in a representative capacity without first meeting state class action requirements. *See Arias*, 46 Cal. 4th at 981-88 and n.5; Cal. Labor Code § 2699 *et seq.* In fact, nothing in PAGA or in the California Supreme Court's decision in *Arias* interpreting PAGA limits non-class "representative" actions to those involving "common issues" or by other criteria that would render them capable of mass resolution as required by Rule 23. *Id.* Whereas, as a matter of **federal** procedure plaintiffs must meet the class action prerequisites set forth in Rule 23 if they intend to pursue a claim in a representative capacity on behalf of similarly aggrieved individuals. *See* Fed. R. Civ. P. 23 ("members of a class may sue or be sued as representative parties on behalf of all members only if… [they meet the prerequisites of Rule 23])". A Plaintiff is simply not provided a procedural choice under Rule 23. *See e.g. EEOC v. Gen. Tel. Co.*, 599 F.2d 322, 328-31 (9th Cir. 1979) (unless explicitly exempted by statute claims brought in a representative capacity on behalf of similarly situated employees must comply with Rule 23).

Although Wendy's is not aware of any case disposing of this precise issue, this Court's prior decision in *Bato* comes very close to it and certainly applies reasoning that would dictate the same result.

> Labor Code § 2699.3 (a)(2)(C) ... is a "procedural provision ...

> that directly conflicts with the Federal Rules of Civil Procedure governing amendment," and that, under the Supremacy Clause, U.S. Const. art. VI, cl. 2, and *Hanna v. Plumer*, 380 U.S. 460 (1965), the Federal Rules that govern amendment of pleadings in federal court apply, not the state provision.

Bato, *supra*, Order at 10-11.

Further, the decisions of other federal courts on closely related questions, particularly in the context of pleading a claim for punitive damages, are instructive. Under California law, punitive damages claims are subject to a heightened pleading standard. *See* Cal. Code Civ. P. § 3294; *Smith v. Superior Court*, 10 Cal. App. 4th 1033, 1041-42 (1992). Whereas, in the Ninth Circuit (prior to the Supreme Court's recent decision in *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009)), a conclusory pleading was sufficient. *Clark*, 106 F. Supp. 2d at 1018-19; *Robinson v. Managed Accounts Receivables Corp.*, 654 F. Supp. 2d 1051, 1066 (C.D. Cal. 2009). District courts applying *Erie* to the above scenario have repeatedly found a direct conflict and held that, while state substantive law governs a Plaintiff's claims for punitive damages under California Civil Code section 3294, Federal Rules of Civil Procedure govern the punitive damages claim procedurally with respect to the adequacy of the pleadings. *See e.g. Clark v. State Farm Mutual Automobile Ins. Co.*, 231 F.R.D. 405, 406-07 (C.D. Cal. 2005); *Jackson v. East Bay Hosp.*, 980 F. Supp. 1341, 1353-54 (N.D. Cal. 1997); *see also Metabolife*, 264 F.3d at 845-46 (holding that the discovery limitations provided for in California's anti-SLAPP statutes, sections 425.16(f) and (g), directly conflict with the discovery allowing aspects of Federal Rule of Civil Procedure 56).

Similarly, because a direct conflict exists between the state procedure under PAGA and Rule 23, the Court must apply Rule 23. As such, Plaintiff's "representative" claim must meet the class action prerequisites set forth in Rule 23. Because the time to file a motion for class certification has passed, Plaintiff's

allegations respecting the prosecution of a "representative" action should be stricken from the complaint.

Even absent a "direct conflict" between PAGA and Rule 23, the general principles of *Erie* dictate that the class action requirements set forth in Rule 23 apply. In order to assist the Court in determining whether a state rule is substantive or procedural the Supreme Court has propounded an "outcome determinative test". *Gasperini*, 518 U.S. at 427; *Snead*, 237 F.3d at 1090. Under this test, the question is:

> does [the federal rule] significantly affect the result of the litigation for a federal court to disregard a law of the state that would be controlling in an action upon the same claim by the same parties in State court?

Id. Whether such disregard would affect the outcome of an action "must be guided by the 'twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of inequitable administration of the laws.'" *Gasperini*, 518 U.S. at 428 *quoting Hanna*, 380 U.S. at 468. The Court should not apply this test so as to "produce a decision favoring the application of the state rule unless one of these aims will be furthered." *Snead*, 237 F.3d at 1090.

Here, applying the class action prerequisites of Rule 23 would not be "outcome determinative" on its face. As a matter of state procedure, a plaintiff is *free to choose* to bring a PAGA claim either as class action or as a non class representative claim, but cannot be *compelled* to bring it as a class action. *See Arias*, 46 Cal. 4th at 981 n. 5. If a plaintiff is able to choose to pursue a PAGA claim as *either* a class action *or* a non-class representative action, how can it be said that the non-class procedural option is a "substantive" right? Additionally, if a litigant is free to choose between bringing a PAGA claim as a class action or a non-class representative action there is little, if any, risk that the failure to permit a Plaintiff this same procedural process in federal court would lead to forum shopping or inequitable administration of laws.

Finally, federal courts have an overriding interest in ensuring that PAGA claims comply with Rule 23: namely judicial economy and due process. If a litigant is permitted to pursue a non-class representative PAGA action in federal court without the scrutiny of class certification under Rule 23, the court will be inundated with issues related to who is a similarly situated "aggrieved employee" under PAGA and the mini trials related to each employee's individualized situation. *See e.g.* Cal. Labor Code § 2699(a) and (c). Moreover, these individuals will not have the right or opportunity to participate or even obtain notice of a pending non-class representative PAGA claim.

PAGA's optional state law non-class representative procedure is not applicable, and is trumped by Federal Rule of Civil Procedure 23 pursuant to the *Erie* Doctrine. Plaintiff has not sought class certification of any of his existing claims, let alone his improperly added PAGA claim. And the time to do so has expired. Accordingly, Plaintiff's non-class "representative" allegations must be stricken from the SAC.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff's new PAGA claim, Count 6, should be dismissed, with prejudice. Plaintiff's class allegations, definitions, and all references thereto, should be stricken from the SAC, without leave to amend. Finally, Plaintiff's non-class "representative" allegations, should be stricken without leave to amend.

Dated: May 3, 2010

JONES DAY

By: /s/ Mark D. Kemple
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